

WD NO. 61687

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

MISSOURI STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS,

Relator

vs.

THOMAS J. BROWN, III
CIRCUIT JUDGE, DIVISION I
CIRCUIT COURT OF COLE COUNTY,

Respondent.

**REPLY BRIEF OF RELATOR MISSOURI STATE BOARD OF REGISTRATION
FOR THE HEALING ARTS**

Glenn E. Bradford MO #27396
Edward F. Walsh MO #45046
Nichole M. Mudd MO #52086
GLENN E. BRADFORD & ASSOCIATES, P.C.
The Palace Building
1150 Grand Avenue, Suite 230
Kansas City, Missouri 64106
(816) 283-0400 FAX (816) 283-0820

ATTORNEYS FOR RELATOR
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POINTS RELIED ON

- I. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD-S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS JURISDICTION AND DISCRETION IN THAT THE BOARD-S DISCIPLINARY ORDER CONTAINED SUFFICIENT FINDINGS IN WHICH THE COURT COULD DETERMINE THE DISCIPLINE IMPOSED WAS SUPPORTED BY COMPETENT EVIDENCE.**

Heinen v. Police Personnel Bd. of Jefferson City,
976 S.W.2d 534 (Mo. App. W.D. 1998)

Burgdorf v. Board of Police Commissioners,
936 S.W.2d 227 (Mo. App. E.D. 1996)

M.M. v. State Bd. of Accountancy,
728 S.W.2d 726 (Mo. App. E.D. 1987)

- II. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD-S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE IN THAT A WRIT OF PROHIBITION IS A PROPER REMEDY TO SEEK IN THIS CASE.**

State ex. rel. Chassaing v. Mummert,
887 S.W.2d 573, 577 (Mo. banc 1994).

Comfort v. County Council of St. Louis County,
822 S.W.2d 460 (Mo. App. E.D. 1991)

Yoder by Larson v. Horton,
678 S.W.2d 9010 (Mo. App. E.D. 1984)

- III. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REMANDED THE BOARD-S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE IN THAT THE SUPREME COURT OPINION**

ENTERED IN THE UNDERLYING CASE DOES NOT PROHIBIT THE RELIEF SOUGHT AND THIS COURT'S ENTRY OF A WRIT IN PROHIBITION WOULD NOT RESULT IN CONFLICTING DECISIONS.

Schumann v. Mo. Highway & Trans. Comm'n,
912 SW2d 548, 552 (Mo. App. W.D. 1995).

Richardson v. Quicktrip Corp.,
81 S.W.3d. 54, 59 (Mo. App. W.D. 2002)

ARGUMENT

I. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE JUDGE BROWN EXCEEDED HIS JURISDICTION AND DISCRETION IN THAT THE BOARD'S DISCIPLINARY ORDER CONTAINED SUFFICIENT FINDINGS IN WHICH THE COURT COULD DETERMINE THE DISCIPLINE IMPOSED WAS SUPPORTED BY COMPETENT EVIDENCE.

A. The Board made adequate findings of fact.

The Respondent's Brief contends that the Board did not make findings sufficient for Judge Brown to review. It is the Board's contention that in addition to exceeding his jurisdiction, Judge Brown did have sufficient findings to review. ¶When reviewing administrative decisions, the court's task is limited to determining whether the decision was supported by competent and substantial evidence upon the whole record.¶ *Heinen v. Police Personnel Bd. of Jefferson City*, 976 S.W.2d 534, 539 (Mo. App. W.D. 1998). In presenting a subject for appellate review, the written decision of the administrative agency must show how the controlling issues have been decided. *Id.* In addition, the agency's findings of fact must be sufficiently specific to enable the court to review the agency's decision. *Id.* It is the Board's belief that it met the criteria as stated above.

The Board states in its Findings of Fact, Conclusions of Law and Order that; 1) it had received the record to the proceedings before the Administrative Hearing Commission and the Findings of Fact and Conclusions of Law, and 2)¶that they are incorporated herein by reference as if fully set forth in this document.¶ (*Petitioner's Appendix C1-C2*). In making its

determination the AHC found that; 1) Tendai tendered fraudulent sticky notes as evidence in a Board Proceeding, which appeared to be made up after the fact and did not reflect the true course of events in patient S.G.'s care; 2) that Tendai never personally informed S.G. that the fetus had IUGR; 3) that he never referred S.G. to a perinatologist, a specialist dealing with problems of late pregnancy; and 4) ultimately concluded that Tendai's omissions in the treatment of S.G. constitute a gross deviation from the standard of care and demonstrate a conscious indifference to professional duty. (*Appendix D6-7, D17-18*). In addition, the Board relied upon, and even quoted expert witness, Dr. Cameron, who testified that; "This baby didn't have to die. This was a preventable death." (*Appendix D18*). The ultimate conclusion was that there was cause to discipline Dr. Tendai for incompetence, in addition to his conduct being harmful to the health of a patient and a finding of repeated negligence in his treatment of S.G. (*Appendix D22*). It was these findings and more that the Board relied on in making its determination.

The controlling issues in this case were, based on the treatment of S.G. and J.W., that there was cause to discipline Tendai's license. In making its findings the AHC and thereby the Board showed how these controlling issues were determined. In fact, Respondent affirmed the Board's Findings of Fact, Conclusions of Law in their entirety. (*Appendix A4*). The Board must and did make sufficiently specific findings of fact to enable the court to review the agency's decision to discipline. These facts are not only sufficiently specific for why the agency has cause to discipline, they are also more than sufficient to show support for how the

agency has chosen to discipline. Therefore, based on the whole record there was sufficient cause to discipline Tendai in any manner which is within the Board's statutory authority.

Respondent relies heavily on *Heinen, supra.*, and *Webber v. Firemen's Retirement System*, 899 S.W.2d 948 (Mo. App. E.D. 1995), in support for Judge Brown's authority to remand for further fact finding on the so-called "equal protection" issue. However, both cases are readily distinguishable from the present case. In the present case the Respondent contends that findings of fact must specifically be made as to evidence presented by the defendant/doctor during the **discipline hearing**, when it has already been determined that there is cause to discipline the doctor, and sufficient findings were made by the AHC that support the discipline imposed by the Board of Healing Arts. In both *Webber* and *Heinen*, the Court determined there were not sufficient findings to show **why** there was cause to even discipline the defendant. Here the issue is whether the Board must make specific findings as to why it decided to discipline one way versus another. The Board contends that Judge Brown does not have authority to remand for further fact finding as to why the Board disciplined Tendai in the manner it did versus choosing another method of discipline, when its findings of fact and conclusions of law determining **there is cause to discipline**, have been upheld in their entirety.

A more comparable case is *Burgdorf v. Bd. of Police Commissioners*, 936 S.W.2d 227, 233 (Mo. App. E.D. 1996). *See also, M.M. v. State Bd. of Accountancy*, 728 S.W.2d 726 (Mo. App. E.D. 1987); *Linton v. Missouri Veterinary Medical Bd.*, 998 S.W.2d 513 (Mo. banc 1999). In *Burgdorf*, the Board of Police Commissioners issued its Findings of Fact and

Conclusions of Law finding that the officer was guilty of violating two rules. *Id.*, at 230. Based on these findings the Police Board dismissed him from the police department. *Id.* In the officer's appeal he too raised the issue that his equal protection rights were violated because similarly situated police officers received lesser punishments for similar offenses. *Id.*, at 232.

In *Burgdorf*, as in this case, the Board made sufficient findings as to why there was cause to discipline the officer but did not make specific findings as to the issue of whether his equal protection rights were violated in disciplining him in the manner they did vis-a-vis other officers. *Id.*, at 230, 233. The Court determined that, so long as the discipline is within the a board's statutory authority, a board has broad authority to impose whatever discipline it finds appropriate. *Id.*, at 233. As with *Burgdorf*, the Board here determined there was cause to discipline Tendai, made sufficient findings as to that determination, then disciplined him within its statutory authority.

Under existing Missouri law, the Board as a mater of law does not have to justify a disciplinary action in relation to discipline meted out to other licensees, so long as such actions are within the legal limits of its authority. *Burgdorf*, 936 S.W.2d at 233; *M.M. v. State Bd. of Accountancy*, 728 S.W.2d at 727; *Linton*, 998 S.W.2d at 515-516. To require the Board to distinguish the discipline in a given case in light of every other possibly comparable previous case would be highly burdensome. In fact, under existing Missouri law, disciplinary orders do not have to be consistent from licensee to licensee, so long as a disciplinary order

is within the Board's statutory authority. Put another way, the Board has no legal duty to justify a particular disciplinary order as consistent with past actions.

Therefore, Judge Brown erred and exceeded his authority in reversing the Board's Disciplinary Order regardless of whether the Board made specific findings as to how Tendai's discipline relates to prior Board disciplinary actions. Judge Brown had no authority to remand to the Board for the entry of additional findings of fact and conclusions of law because the Board had no legal duty to consider other punishments before it imposed discipline. Judge Brown's remand places a substantial burden on the Board which Missouri law has not previously placed on the Board.

II. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REVERSED AND REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE IN THAT A WRIT OF PROHIBITION IS A PROPER REMEDY TO SEEK IN THIS CASE.

The Supreme Court has recognized three situations in which writs of prohibition will issue. *State ex. rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. banc 1994), *See, Ferrellgas, LP, v. Williamson*, 24 S.W.3d 171, at 175 (Mo. App. W.D. 2000). First, where there is usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction. *Id.* The second of the three situations is to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks power to act as contemplated. *Chassaing*, 887 S.W.2d at 577. The third situation is limited to when an absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made

available to respond to a trial court's order.@ *Id.*, quoting *State ex. rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983). In addition to meeting the third category, as argued in Relators Brief Point III, the issue before the Court also falls within the second of the three situations.

Judge Brown's remand was done in the absence of jurisdiction to remand and thereby was a nullity. *See, Yoder by Larson v. Horton*, 678 S.W.2d 901, 904 (Mo. App. E.D. 1984); *Peters v. United Consumers Club*, 786 S.W.2d 192, 193 (Mo. App. E.D. 1990). Based on the record presented, Judge Brown only had authority to affirm or reverse the Board's decision. Because Tendai could only show disparate treatment without any evidence of discriminatory conduct, Respondent should have affirmed the Board's Disciplinary Order as it did in all other aspects. Judge Brown certainly had no authority to remand for further fact-finding based on current Missouri law interpreting ' 536.140.4. *See, Comfort v. County Council of St. Louis County*, 822 S.W.2d 460 (Mo. App. E.D. 1991). Therefore, Judge Brown's action in remanding was done without jurisdiction and was a nullity.

There is no provision in ' 536.140 authorizing a judicial remand when the evidence was actually presented to the administrative agency and presumably considered. There is no provision in ' 536.140 which would support and justify the circuit court's purported remand in the present case. Under ' 536.140, RSMo 1994, a trial court reviewing a petition for review of an administrative adjudication has the authority to reverse if the agency's action was arbitrary, capricious, unsupported by substantial evidence, unconstitutional, or an abuse of discretion. In reviewing the decision, the evidence and all reasonable inferences therefrom

are to be viewed in the light most favorable to the Board. *State Board of Registration for the Healing Arts v. Masters*, 512 S.W.2d 150, 157-58 (Mo. App. 1974). The agency's action is affirmed if it was supported by substantial evidence upon the whole record. *State Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440, 441 (Mo. App. W.D. 1991).

Section 536.140 provides for remand in certain specified cases only, such as when evidence was not considered which was reasonably available. This is not the issue in the present case.

Under the statute, Judge Brown had the authority to reverse the Board's Disciplinary Order, if Tendai could prove disparate treatment with evidence of discriminatory intent. Here, Tendai did not present any evidence of discriminatory intent nor could such intent be inferred merely from the disparate treatment. Given the remainder of Respondent's Judgment and Opinion, he should have affirmed the Board's Disciplinary Order in its entirety. Judge Brown certainly did not have the statutory authority to remand and to order the Board to make findings of fact as to the differences in the cases.

The Legislature has strictly limited the power of the circuit court to remand to an administrative board. Section 536.140 defines the scope of appellate review. *Hernandez v. State Bd. of Registration for Healing Arts*, 936 S.W.2d 894, 900 (Mo. App. W.D. 1997).

A remand for the entry of factual findings based on evidence already in the record is not a remand authorized by the Legislature in ' 536.140.4. Respondent's action in remanding, taken in excess of his specific statutory authority, was in excess of his jurisdiction and therefore prohibited.

III. RELATOR BOARD IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT JUDGE BROWN FROM ENFORCING HIS ORDER AND JUDGMENT TO THE EXTENT IT REMANDED THE BOARD'S DISCIPLINARY ORDER FOR FURTHER FACTUAL FINDINGS BECAUSE THE RELIEF SOUGHT HERE IS APPROPRIATE IN THAT THE SUPREME COURT OPINION ENTERED IN THE UNDERLYING CASE DOES NOT PROHIBIT THE RELIEF SOUGHT AND THIS COURT'S ENTRY OF A WRIT IN PROHIBITION WOULD NOT RESULT IN CONFLICTING DECISIONS.

A. Board's Petition is Timely and Proper

The original matter before the Supreme Court, case SC83783, concerned the substantive issue of whether the imposed discipline by the Board violated Dr. Tendai's equal protection rights. Because this substantive issue was before the Supreme Court the Board felt that the Court's decision on that issue would possibly make the underlying procedural issue of whether Judge Brown had authority pursuant to ' 536.140.4 to remand for further fact finding moot. However, the Supreme Court held that it did not have jurisdiction on the substantive issue of whether there was an equal protection violation because there was not a final judgment against Dr. Tendai. (*Relator's Appendix B*). It was after the Supreme Court's ruling that the Board felt it was relevant and ripe to address the underlying procedural issue of whether Judge Brown even had authority to remand the Board's determination for further fact finding. The Board then filed its Writ in Prohibition before this Court to address the procedural issue.

Dr. Tendai filed an appeal with the Supreme Court alleging that the Administrative Hearing Commission's decision and the discipline imposed by the Board were arbitrary, capricious and unreasonable, and unsupported by competent and substantial evidence. Dr. Tendai further challenged the constitutional validity of ' ' 334.100.2(5) and 334.100(25), RSMo. stating that ' 334.100.2(5) is unconstitutionally vague and that both statutes violate the equal protection clause. Dr. Tendai's argument concerning ' ' 334.100.2(5) and 334.100(25), were based in part on an allegation that his equal protection rights were violated in that he received discipline more severe than other physicians whose cases were similar to his. It is this last issue and Judge Brown's ruling concerning it on May 29, 2001 that brings this matter before the Court now.

The original matter before the Supreme Court that was ruled on June 11, 2002, was appealing the substantive issues concerning the underlying case of *Mark M. Tendai, M.D., Petitioner, v. Board of Registration for the Healing Arts, Respondent*, Case No. 00CV323854, in which Judge Brown affirmed in its entirety the AHC's ***Findings of Fact and Conclusions of Law***, and affirmed in part and reversed in part the Board's ***Findings of Fact and Conclusions of Law and Order***. (*Appendix A*). Therefore, when the Court stated in its Order that the partial remand by Judge Brown created ***A*** live issue that has not been resolved,[@] and determined that it did not have jurisdiction to consider the appeal, it was not, by definition, addressing the substantive issue on appeal. In addition, the Supreme Court's determination that

it did not have jurisdiction to consider the appeal, was not a ~~A~~last controlling decision¹ by the Supreme Court, concerning the issue of whether Judge Brown had authority to remand for further fact finding. At best, what Respondent is relying on as ~~A~~controlling~~@~~ is only non-binding dicta, thereby not controlling. See, *Richardson v. Quicktrip Corp.*, 81 S.W.3d. 54, 59 (Mo. App. W.D. 2002). Therefore, this Court's granting of an order in prohibition is not procedurally inconsistent with, nor would it overrule, the Supreme Court's prior decision in this matter.

The Respondent's Brief states that, ~~A~~the Supreme Court itself has determined that there can be no further appeal of the merits of this action until after the Board has taken action on the remand by Judge Brown. Thus this Court's Preliminary Order in Prohibition is directly contrary to the decision of the Supreme Court, by having the effect of preventing the Board from issuing its decision on remand.~~@~~(*Respondent's Brief*, p 39). The Board believes this to be an incorrect interpretation of the Supreme Court's determination. The Supreme Court simply held it did not have jurisdiction to consider the appeal at that time. The Court did not hold that there can be no further appeal of the cause of action. Respondent also asserts that the Supreme Court found no error with Judge Brown's remand. It is the Board's understanding that Supreme Court did not make such a finding, expressly or impliedly, because the procedural issue of whether Judge Brown had authority to make such a determination was not before the Supreme Court at that time.

¹ *Schumann v. Mo. Highway & Trans. Comm'n*, 912 SW2d 548, 552 (Mo. App. W.D. 1995).

On October 22, 2002, Respondent filed a Petition for Prohibition and Writ of Mandamus with the Supreme Court addressing the same issues as it has before this Court. In this petition Respondent claimed, as it does here, that the Supreme Court has jurisdiction and that the Supreme Court's decision is controlling. On November 26, 2002, approximately one week **before** Respondent filed Respondent's Brief, the Supreme Court denied Respondent's petition for writ of prohibition and writ of mandamus. (***Appendix E***, attached). Surely if the Supreme Court felt a decision by this Court to grant an order of prohibition would result in a conflicting decision and multiple appeals^o the Supreme Court would not have denied the Respondent's petition.

Therefore, a ruling by this Court is not procedurally inconsistent, nor does it nullify the Supreme Court's previous decision in this matter. The Supreme Court's earlier determination in this cause was not based on substantive issues, which if resolved at the Supreme Court may have made the underlying procedural issues moot. In addition, the Supreme Court's holding was only that it did not have jurisdiction at that time, any other interpretations of that decision by the Respondent is dicta and thereby not binding on the lower courts. For these reasons, dismissal of Relator/Board's Petition would not be proper.

CONCLUSION AND REQUEST FOR RELIEF

Relator requests that this Court make permanent its Preliminary Order in Prohibition, entered on September 9, 2002, for the above-stated reasons and that Respondent's Motion to Dismiss be denied and that Respondent's Application for Transfer be denied. Additionally,

Relator request that Respondent be directed to enter an Opinion and Judgment affirming the Board's Disciplinary Order in its entirety.

#27396

Glenn E. Bradford MO

#45046

Edward F. Walsh MO

#52086

Nichole M. Mudd MO

P.C.

GLENN E. BRADFORD & ASSOCIATES,

The Palace Building
1150 Grand Avenue, Suite 230
Kansas City, Missouri

64106

(816) 283-0400 FAX (816) 283-

0820

ATTORNEYS FOR RELATOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed this ____ day of December, 2002, to:

Johnny K. Richardson

BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102
Attorneys for Mark M. Tendai, M.D.

Thomas J. Brown, III
Circuit Judge, Division I
Circuit Court of Cole County
301 East High Street Jefferson City, Missouri 65101
Respondent

An Attorney for Relator

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), Appellant hereby certifies that this brief includes the information required by Rule 55.03; complies with the limitations contained

in Rule No. 84.06(b); and that, according to the word count feature in WordPerfect, the entire brief contains 3330 words and 290 lines of monospaced type. Appellant further certifies that, pursuant to Rule 84.06(f), it is filing with this brief a computer disk which contains a copy of the above and foregoing brief, which was prepared using WordPerfect 8.0, and Appellant also certifies that the disk has been scanned for viruses and is virus-free.

An Attorney For Relator